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No. 88-2086

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMADO SALAZAR-CALDERON, *et al.*,
Petitioners,
v.
PRESIDIO VALLEY FARMERS ASSOCIATION, *et al.*,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents Presidio Valley Farmers Association, *et al.* submit this brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by petitioners Amado Salazar-Calderon, *et al.*

I. THE FIFTH CIRCUIT'S DECISION THAT THE DISTRICT COURT'S CLASS CERTIFICATION RULINGS ON REMAND DID NOT RELATE BACK DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF OTHER CIRCUITS. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS IN AMERICAN PIPE & CONSTRUCTION CO. V. UTAH AND CROWN, CORK & SEAL CO. V. PARKER.

The district court's original decisions to deny class certification in both cases were affirmed by the Fifth Circuit on the original appeals. On remand, the district court certified classes in both cases and held that its class certifications related back to the original filing of the class actions, thus reviving the claims of many individuals that otherwise would have been barred. Although the Fifth Cir-

cuit upheld the class certifications on remand, it ruled that "[t]he two-year statute of limitations had run during the time between the original denial and the district court's reversal" and that the belated class certifications did not revive claims that had become time-barred.[1] 863 F.2d at 390. The Fifth Circuit's ruling denying relation-back effect to the subsequent class certifications does not conflict with any other circuit court decisions and comes squarely within the guidelines of this Court governing class action tolling.

In trying to establish that the Fifth Circuit's decision has "carved out an exception to the 'relation back' principle," Petition for Certiorari, at 11, petitioners have attempted to obscure the major difference between this case and other situations where relation-back is clearly and undisputedly justified. The rules governing class action tolling are clear. There is no dispute that the filing of a class action tolls the statute of limitations for all members of the prospective class. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983). As a result of such tolling, a district court's decision to certify a class action relates back to the date the class action was first filed, even when the decision to certify the class comes many years after the class complaint was filed. A corollary of the general rule is that such tolling ceases and the statute of limitations begins to run anew when the district court denies class certification. *American Pipe & Construction Co.*, 414 U.S. at 561; *Crown, Cork & Seal Co.*, 462

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[1]In the *Salazar* case, class certification was originally denied on March 30, 1981 and was granted on remand on April 18, 1986, more than five years later. In the *Montelongo* case, class certification was originally denied on April 5, 1983 and was granted on remand on April 18, 1986, more than three years later. The applicable statute of limitations was two years. 863 F.2d at 390; 765 F.2d at 1351.

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U.S. at 354. At that point, members of the putative class who wish to preserve their claims must either intervene or file separate actions within the time remaining before the statute of limitations expires. *Id.*

There is one exception to the rule that tolling ceases and the statute of limitations begins running anew upon denial of class certification. It has been held that when a court of appeals *reverses* a district court's *denial* of class certification the certification ruling relates back to the date that the original class complaint was filed. *See, e.g., Gelman v. Westinghouse Elec. Corp.,* 556 F.2d 669, 701 (3rd Cir. 1977); *Satterwhite v. City of Greenville,* 578 F.2d 987, 997 (5th Cir. 1978) (en banc). The justification for allowing relation-back in such cases is to preserve the right to appellate review. Since interlocutory orders (such as orders denying class certification) are not appealable until a final judgment is rendered, "[a]ny other rule [than relation-back to the date the class action was initiated] would result in denying class members any meaningful appellate review, since, in most cases, such review will not be available until after the applicable limitations period has run." *Gelman,* 556 F.2d at 701.

This case clearly does not come within the limited exception allowing relation-back where the court of appeals *reverses* the denial of class certification. The petitioners sought appellate review of the district court's original denial of class certification and were unsuccessful in persuading the Fifth Circuit to reverse the district court's denial of class certification, so the justification for allowing relation-back in the limited exception cited above does not apply to this case. Petitioners obtained meaningful appellate review; they simply lost their appeal.

The Fifth Circuit's ruling that tolling ceased and the statute of limitations began to run anew when the district court originally denied class certification follows this Court's rulings in *American Pipe & Construction Co.* and *Crown, Cork & Seal Co.* Furthermore, the Fifth Circuit's

conclusion that the district court's belated class certifications on remand did not revive claims which had become time-barred in the interim is consistent with a long line of cases holding that no class action may proceed on behalf of class members whose claims are barred by the applicable statute of limitations and that certification of a class action does not revive barred claims. *See, e.g., Domingo v. New England Fish Co.,* 727 F.2d 1429, 1442 (9th Cir. 1984); *Laffey v. Northwest Airlines, Inc.,* 567 F.2d 429 (D.C. Cir. 1976); *Escott v. Barchris Construction Corporation,* 340 F.2d 731, 733 n.3 (2d Cir. 1965); *Burns v. Ersek,* 591 F.Supp. 837, 839-42 (D.Minn. 1984); *Healy v. Loeb Rhodes & Co.,* 99 F.R.D. 540, 543 (N.D.Ill. 1983); *Schmidt v. Interstate Fed. Sav. & Loan Ass'n,* 74 F.R.D. 423, 428 (D.D.C. 1977).

The Fifth Circuit's decision in this case does not conflict in any way with decisions of this Court or other circuit courts. Counsel for the petitioners conceded in oral argument before the Fifth Circuit that petitioners had no cases to support their argument concerning relation-back in this case. In their petition, petitioners also admit that "the issue in its narrowest form has not been addressed by other courts." Petition for Certiorari, at 10. They contend, however, that the Fifth Circuit's decision is in conflict "in principal" with several decisions of the Third Circuit. The two Third Circuit cases now cited by petitioners to support their erroneous claim that there is a conflict in circuit court decisions are clearly distinguishable from this case and do not stand for the principle petitioners seek to establish. The two cases, *Neely v. United States,* 546 F.2d 1059 (3rd Cir. 1976), and *Norris v. Frame,* 585 F.2d 1183 (3rd Cir. 1978), clearly fall within the limited exception cited above, since in both cases the Third Circuit held that the district court had acted improperly in denying class certification and reversed the denial of class certification.

In *Neely,* the Third Circuit reversed the district court's denial of class certification on the ground that the district

court made a determination that the class was unmanageable without taking into account data regarding the difficulty of determining class membership. *Id.* at 1071 Although the court of appeals emphasized "that we are not ordering the certification of a class," *id.* at 1971, the fact that it negated the denial of certification and the fact that the district court could certify the class on remand after considering data it had failed to take into account prior to the appeal brings this case squarely in line with those cases where the court of appeals reverses the denial of class certification.

Similarly, in *Norris,* the Third Circuit determined that the district court had used an improper standard in denying class certification. The court of appeals held that the district court had improperly used the standard applicable to (b) (3) classes in ruling on a (b) (2) class and remanded to the district court for it to redetermine the propriety of class certification. The *Norris* case also fits squarely within the line of cases where the court of appeals reverses the denial of class certification.

There is no merit to petitioners' contention that "[d]enying full relation back effect to the certification decision creates an unnecessary level of uncertainty and doubt in the minds of potential members of any Rule 23(b) (3) class." Petition for Certiorari, at 16. The hollowness of petitioners' argument is readily apparent when one considers that the district court could have denied class certification following remand from the court of appeals. Petitioners could not possibly argue that the time-barred individuals could then have pursued their individual actions, since the time for intervening or filing separate actions would have long since passed. This Court has made clear in *American Pipe* and *Crown, Cork & Seal* that, once a district court denies class certification, members of the putative class must take the necessary steps to preserve their claims within the time remaining before the statute of limitations expires. In fact, petitioners were

fully aware of their obligation. They pointed out to the district court, in connection with the *Montelongo* case, that "[a]fter the class certification was denied April 5, 1983, the statute of limitations began to run against the class, but because the statute had been tolled since July 13, 1978, Intervenors had ample time to preserve their claims and did so." *Montelongo,* Intervenors' Response to Counter-Claim Defendants' Motion for Summary Judgment, at 12-13 (November 14, 1983).

In fact, many of the petitioners who sought to use the district court's certification rulings to revive their moribund claims actually sought to intervene or file separate actions following the district court's original denial of class certification. For various reasons, the claims of most of these individuals were originally denied by the district court and the court of appeals. 863 F.2d at 390; 765 F.2d at 1351-52. On remand, the district court relied on its relation-back decision to include in the resurrected class three groups of workers whose claims had been previously barred. Thus, it was not simply a matter of the statute of limitations which barred recovery by many of the petitioners, but the doctrines of *res judicata* and law of the case, as well.

Finally, if this Court were to grant the petition as to this issue, it would be necessary for the Court to consider the propriety of the district court's certification of the classes following remand. The growers challenged the grant of certification both in the district court and in the court of appeals on the ground that certification of the classes following remand violated Fed.R.Civ.P. 23(c) (1) since a decision had already been rendered on the merits and that the requirements of Fed.R.Civ.P. 23(b) (3) were not met since the only remaining issue was the individual determination of damages to award each plaintiff.

II. THE FIFTH CIRCUIT DID NOT ERR WHEN IT HELD THAT THE DISTRICT COURT VIOLATED THE APPELLATE COURT'S EARLIER MANDATE BY FINDING THE GROWERS LIABLE ON REMAND UNDER A LEGAL THEORY OF RECOVERY NOT EVEN URGED ON THE FIRST APPEAL. THE DEFENDENT GROWERS PRESERVED THEIR POINT BOTH BEFORE THE DISTRICT COURT AND THE COURT OF APPEALS.

Petitioners contend that the Fifth Circuit erred when it held that the district court violated the mandate of the original appeal on remand when it held the growers liable under state law for breach of contract,[2] a legal theory not relied on by the district court in its original decision and not urged by petitioners in their original appeal to the Fifth Circuit. The Fifth Circuit held that its original decision had merely remanded one FLCRA violation to the district court for a redetermination of damages and "did not reopen the legal theory involved." 863 F.2d at 387. Petitioners contend that their second issue raises "an important question of federal law," namely, "the deference that an appellate court should extend to the district court in the interpretation of an admittedly vague mandate." Petition for Certiorari, at 10. Not only have the petitioners failed to present an issue that warrants the attention of this Court, but their argument rests on three false premises.

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[2]Three separate issues hinged on the new legal theory. By utilizing a different theory of recovery, the district court sought to circumvent the Fifth Circuit's ruling that the individual growers were not jointly and severally liable for the Association's FLCRA violations in the 1978 case. *See* Petition for Certiorari, at App.129-App.131. In addition, the district court relied on the new legal theory to award attorney's fees to petitioners, something it had not done prior to the original appeal. The Fifth Circuit reversed the district court on both points. 863 F.2d at 387. Petitioners also sought to use the change in legal theory as an opportunity to seek prejudgment interest, but both the district court and Fifth Circuit rejected their claim. 863 F.2d at 392.

First, petitioners contend that the court of appeals reversed the district court on this point "without explanation." Petition for Certiorari, at 17. The Fifth Circuit's opinion, however, explained that

> . . . We originally vacated the trial court's damage award for a sixth FLCRA violation, "failure to abide by the working arrangement." We remanded the case to allow the district court to redetermine damages for that FLCRA violation in light of "additional terms" that we found were part of the work agreement. *Salazar,* 765 F.2d at 1353; *Brock,* 765 F.2d at 1353; *Brock,* 765 F.2d at 1357. We did not reopen the legal theory involved. Yet, on remand, the district court found PVFA liable under a legal theory not urged in the original appeals, breach of state law contract. This finding reaches beyond our original mandate, and we reverse the district court's findings insofar as they are based on a state law breach of contract theory. *See Stamper v. Baskerville,* 724 F.2d 1106, 1107-1108 (4th Cir. 1984) (trial court may decide matters left open on remand only insofar as they are consistent with appellate court's mandate).

863 F.2d at 387. The petitioners' claim that the Fifth Circuit reversed the district court on this point "without explanation" is clearly false.

Secondly, the petitioners contend that the defendant growers failed to properly raise the issue, a charge that the record clearly reveals to be false as well. When the case was remanded to the district court, the growers filed a written status report with the district court pointing out that

> [w]ith respect to the Association, the only issues left to be resolved involve the alleged FLCRA violation for breach of the work agreement by the Association. In connection with this issue, the Court must determine (1) whether the workers waived actual damages, (2)

> which workers are entitled to recover from the Association for this breach of FLCRA, and (3) how much damages are to be awarded for this breach of FLCRA . . . With respect to the individual grower members of the Association, the only issues left to be resolved involve the two alleged violations of FLCRA. . . .

Presidio Valley Farmers Association v. Brock, Counterclaim Defendants' Status Report, at 2 (April 4, 1986). The district court did not make clear that it was relying on a different legal theory until it handed down its memorandum decision and order and final judgment on June 17, 1987, leaving the growers no recourse but an appeal to the Fifth Circuit.

The petitioners' contention that the defendant growers had not raised this issue on appeal to the Fifth Circuit simply ignores the numerous references to this issue in the briefs that the growers filed with the Fifth Circuit. The growers stated in their Reply Brief that

> . . . the workers miscontrue what the Fifth Circuit decided when it remanded this case back to the district court for a reassessment of damages. The Fifth Circuit did not reopen the question of whether the workers could pursue on remand an entirely different claim that they had abandoned prior to the original appeal and had not raised on the first appeal to the Fifth Circuit . . . The Fifth Circuit ruled that the "[t]he damages award for breaches to the work agreement is vacated and remanded for redetermination. . . ." 765 F.2d at 1359. The Fifth Circuit did not direct or authorize the district court to retry the case on a different legal theory.

Reply Brief for Appellants, at 3, 5. Later, in the same brief, the growers stated that

> [a]s noted earlier, to the extent the district court based its judgment on the state law contract claim, it went beyond the mandate of the Fifth Circuit. The

> Fifth Circuit had merely vacated the award of damages for one FLCRA violation and remanded for a redetermination of damages for that one violation. It did not thereby reopen for relitigation a claim which the workers had not pursued in the district court or on their earlier appeal.

Id. at 33-34. Later, in the same brief, the growers responded to the workers' cross appeal on the prejudgment interest issue by noting that

> . . . as pointed out earlier, the workers miscontrued the mandate of the Fifth Circuit in the earlier appeals. The Fifth Circuit decided that the award of damages for the one FLCRA violation should be vacated and reassessed in light of the additional work terms. The Fifth Circuit did not remand for the purpose of relitigating the case on a different legal theory, especially one that had not been pressed below prior to the original appeal and was not part of the original appeal. The remaining cause of action still remained one based on FLCRA, not a common law breach of contract.

Id. at 36.[3] Thus, the petitioners' second issue ("Whether the court of appeals erred in reversing the district court's interpretation of the mandate where defendants did not object to that interpretation in the district court or on appeal") is completely undercut by the fact that the growers clearly preserved their position both in the district court and the court of appeals.

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[3] *See also Salazar*, Brief for Appellants, at 27 ("The only issue left to be resolved was the proper amount of damages to assess for the one FLCRA violation which the Fifth Circuit had vacated on appeal.") and 44 ("As noted earlier, what the Fifth Circuit did was reverse the award of damages for the one FLCRA violation (breach of work agreement) while upholding the award of damages for the other five FLCRA violations. The remand for redetermination of damages for the one vacated FLCRA violation did not convert the action into one for breach of contract.")

Thirdly, the mandate of the earlier appeal was clear, not "vague," as the petitioners contend. Petition for Certiorari, at 10. The Fifth Circuit had clearly remanded the case for a redetermination of damages for the one FLCRA violation, not to try the case on a different legal theory.[4] In fact, as the Fifth Circuit noted in its opinion, the district court relied on a legal theory on remand that the workers had not even urged in the original appeals. 863 F.2d at 387. The court of appeals was certainly in a better position than the district court to determine what its mandate was and to determine what issues had been preserved on appeal by the petitioners. Circuit Judge Higginbotham, who wrote both opinions on the first appeals, also served on the panel that heard the second appeals. Moreover, the workers raised this same issue in the petition for rehearing *en banc* filed with the Fifth Circuit, and not one judge on the Fifth Circuit requested a poll of the court, not even the other active judge who served on the original panel which issued the mandate in question.

Even apart from their false charges, the petitioners have not otherwise raised any valid claim that would warrant this Court's attention. In asking this Court to side with the district court over the court of appeals as to the proper interpretation of the court of appeals' mandate, petitioners are trying to put the cart before the horse. This Court has stated in the strongest terms that ". . . an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsyl-*

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[4]In *Salazar*, the Fifth Circuit had stated that "[b]ecause we have concluded that additional terms were part of the work agreement, however, we remand the award of damages for defendants' alleged breaches of the agreement and remand so that the district court can award damages for those terms and so that it can consider the parties' other complaint about the award." 765 F.2d at 1353. In *Brock*, the Fifth Circuit had stated that "[t]he damages award for breaches of the work agreement is vacated and remanded for redetermination. . . ." 765 F.2d at 1359.

vania R. Co., 334 U.S. 304, 306 (1948). To allow the district court to override the court of appeals' interpretation of the appellate mandate would eviscerate the rule that the lower court must follow the decision of a higher court at an earlier stage of the case and seriously undermine the authority of the appellate courts.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari filed by petitioners should be denied as to both issues.

Respectfully Submitted,

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